

**DAVID G. BANES, Esq.**  
**O'Connor Berman Dotts & Banes**  
**Second Floor, Nauru Building**  
**P.O. Box 501969**  
**Saipan, MP 96950**  
**Telephone No. (670) 234-5684**  
**Facsimile No. (670)234-5683**

**Attorneys for Plaintiffs Moses T. and Qianyan S. Fejeran**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS**

<b>MOSES T. FEJERAN and</b>	)	<b>CIVIL ACTION NO. 05-0033</b>
<b>QIANYAN S. FEJERAN,</b>	)	
	)	<b>NOTICE OF MOTION AND</b>
<b>Plaintiffs,</b>	)	<b>MOTION IN LIMINE TO</b>
	)	<b>RESTRICT THE TESTIMONY OF</b>
<b>vs.</b>	)	<b>DEFENDANT'S EXPERT</b>
	)	<b>RICHARD GILL</b>
<b>AVIATION SERVICES (CNMI), LTD.</b>	)	
<b>d.b.a. FREEDOM AIR,</b>	)	<b>Judge: Munson</b>
	)	<b>Date: N/A</b>
<b>Defendant.</b>	)	<b>Time: N/A</b>
_____	)	

**I) INTRODUCTION**

Defendant plans to call Richard Gill ("Mr. Gill") to testify as an expert witness. *See* Defendants final pre-trial disclosures. Considering that this Court has ruled that Defendant will not be permitted to present any affirmative defenses that it did not specifically plead in its Answer, the scope of relevant testimony that Mr. Gill potentially could offer has been severely limited. The portions of Mr. Gill's report that contain irrelevant information related to these excluded affirmative defenses should be stricken and his report redacted. Furthermore, Mr. Gill should not be allowed to testify to any opinions not contained within his expert report nor as to any excluded defense. Specifically, having never offered an opinion in his report that the

1 stairway was “safe” and having never supplemented this report, Mr. Gill should not be permitted  
 2 to testify at the trial that the stairway in question was “safe.”

## 3 4 **II) ARGUMENT**

5 Mr. Gill’s expert report should be stricken in part and redacted to remove all irrelevant  
 6 opinions and he should not be permitted to testify that the stairway in question was “safe.”

### 7 8 9 **a) Only two defenses remain available to Defendant.**

10 This Court has already ruled that Defendant cannot present any evidence supporting any  
 11 affirmative defenses that were not specifically plead in its Answer. *See* this Court’s Order  
 12 Granting Plaintiffs’ Motion In Limine dated August 21, 2007. Specifically, this Court barred  
 13 Defendant from offering any evidence supporting any avoidance of liability because of FAA  
 14 regulation or the application of the Warsaw Convention. *Id.* Because of this ruling, the only  
 15 defenses now available to Defendant are 1) that the stairs were safe (*i.e.* there is no breached  
 16 duy) and 2) that Mr. Fejeran did not fall the way that he said he did (*i.e.* there is no causational  
 17 link between a defect and Mr. Fejeran’s injuries). With regard specifically to Mr. Gill, the only  
 18 testimony of his that would be relevant would be testimony tending to prove either of those two  
 19 defenses.  
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### 21 22 **b) Significant portions of Mr. Gill’s report are now irrelevant and should be redacted.**

23 Defendant was obligated to provide a written report from Mr. Gill that had to “contain a  
 24 complete statement of all opinions to be expressed and the basis and reason therefore.”  
 25 Fed.R.Civ.P. 26(a)(2). Defendant did so. This report, a copy of which is attached hereto as  
 26 “Exhibit A,” contains six “opinions.” They are:  
 27  
 28

1           1) Inadequate or defective maintenance was not a contributing factor to Mr.  
2           Fejeran's alleged stairway fall accident.

3           2) Improper deployment of the subject stairway was not a contributing factor to  
4           Mr. Fejeran's alleged stairway fall accident.

5           3) The manner in which Aviation Services was utilizing the subject stairway was  
6           not a contributing factor to Mr. Fejeran's alleged stairway fall accident.

7           4) The design of the stairway is typical for built-in or fixed stairways in  
8           commuter aircraft.

9           5) In his report, Dr. Perez claims that the 1985 Uniform Building Code (UBC)  
10          "requires" or "mandates" certain design parameters for stairways; however Dr.  
11          Perez's claims are misleading and/or factually erroneous.

12          6) Mr. Fejeran's alleged stairway fall accident was a result of his own interaction  
13          with the design of the subject stairway and not due to any atypical  
14          design/condition of the subject stairway, nor due to any unexpected or unusual  
15          condition or event.

16          Exhibit A at 2-3. This report then goes into some detail regarding the basis for each of these  
17          "opinions." *Id.*

18          --***Defendant's compliance with manufacturers instructions is an unplead affirmative defense***  
19          ***and, therefore, barred by this Court's order.***

20                The first three opinions, (that ineffective and/or defective maintenance, deployment and  
21                use of the stairway was not a factor in Mr. Fejeran's fall) should be stricken from the report.  
22                Furthermore, the mention of such compliance in the sixth opinion should also be stricken from  
23                the report. Mr. Gill explains that that "the subject stairway and its associated appurtenances  
24                were not maintained consistent with requirements as set forth by the aircraft manufacturer."  
25                Exhibit A at 2. He also says that "[t]here is no evidence to support any allegation that the subject  
26                stairway was not deployed in a manner consistent with the manufacturer's specifications." *Id.*  
27                Finally, he says that "[t]here is no evidence to support any allegation that the subject stairway  
28                was not utilized in a manner consistent with the manufacturer's intention." *Id.* Any such

1 evidence of avoidance of liability because of compliance with manufacturer's specifications  
2 should be stricken and redacted from his report.

3  
4 This is now irrelevant as Defendant is barred from presenting compliance with  
5 manufacturer's maintenance schedules, deployment instructions and/or intended uses as a  
6 defense. Furthermore, this case is about how safe the stairs were *as designed* and not how they  
7 well they were *maintained, deployed and/or used*. These opinions do nothing but set up a  
8 "straw-man" that has nothing to do with how the stairs were designed or how Mr. Fejeran fell  
9 (the only two defenses left). Any mention of compliance with manufacturer's guidelines will  
10 achieve nothing other than to confuse the jury with irrelevant opinion and all mention of it  
11 should be stricken.  
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13  
14 ***--Evidence that the stairways was "typical" of those used on such planes is merely a  
15 restatement of a barred affirmative defense.***

16 Mr. Gill's opinions that the stairways were of the "typical" sort used on this type of  
17 aircraft may have had some relevance in this case when the Defendant was planning on  
18 disclaiming liability because FAA regulations approved the aircraft for flight. However, now  
19 that that particular affirmative defense is unavailable at trial, Mr. Gill's assertions that these  
20 stairs are "typical" simply has no bearing upon whether or not they are safe. The opinion that  
21 these stairs are "typical" would only be relevant if the "typical" nature of those stairs would  
22 somehow insulate Defendant from liability. Since Defendant cannot use the FAA certification of  
23 the aircraft as a shield any longer, that these stairs were "common to that of most commuter  
24 aircraft with built-in fixed stairways" simply is no longer relevant. Opinion number four should  
25 be redacted from his report.  
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1 *--Since compliance with manufacturer's specifications and the stairway being "typical" are*  
 2 *not relevant, Mr. Gill's ultimate conclusion has no basis and should be stricken and redacted.*

3 Mr. Gill concludes that since:

4 (1) the overall condition of the subject stairway was in compliance with the  
 5 manufacturer's maintenance specifications; (2) the deployment of the subject  
 6 stairway was in compliance with the manufacturer's specifications; (3) the subject  
 7 stairway was deployed in a manner consistent with the manufacturer's  
 8 recommendations; and (4) there was nothing atypical associated with the  
 design/configuration of the subject stairway ... Mr. Fejeran's alleged stairway fall  
 accident was a result of his own interaction with the design of the subject  
 stairway.

9 Exhibit A at 3-4. Put simply, because the "typical" stairway was maintained, used and deployed  
 10 like the manufacturer suggests, Mr. Fejeran's fall somehow has to be his fault. However, as  
 11 demonstrated above, the foundational conclusions upon which this sixth conclusion is based are  
 12 no longer relevant to this case, and should be stricken and redacted from this report. Without  
 13 such a foundation this final conclusion must topple. It too should be stricken and redacted from  
 14 this report.

15  
 16 **c) Mr. Gill's report contained no opinions as to whether the stairs were safe and**  
 17 **Defendant never supplemented this report.**

18 Furthermore, Mr. Gill should not be allowed to testify that the stairway in question was  
 19 "safe." *Nowhere in his report does Mr. Gill opine that the stairway was reasonably safe for its*  
 20 *intended use. See generally* Exhibit A. He does say that they are "typical." *Id.* He does say  
 21 that Mr. Fejeran did not fall because of an "atypical" design. *Id.* He does not, however, say that  
 22 this design, be it ever so "typical" is *safe*. *Id.* Certainly the design of the fuel tanks of Ford  
 23 Pintos were "typical" for that make and model of car, but that did not make that particular  
 24 design *safe*. *See Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757 (1981) (demonstrating that  
 25 "typical" and "safe" are not synonymous in holding that "in a strict products liability case,  
 26 industry custom or usage is irrelevant to the issue of defect"). Furthermore, Mr. Gill's report  
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1 was never supplemented pursuant to Fed.R.Civ.P. 26(e)(1) to include any mention of whether or  
2 not he thought the stairs were “reasonably safe.” Since he has never expressed an opinion in  
3 either his initial report or a supplemental report, Mr. Gill should not be allowed to testify that the  
4 stairs in question were “safe” when he takes the stand at trial.

5  
6 **III) CONCLUSION**

7 For the foregoing reasons, Mr. Gill’s report should be redacted as requested.  
8 Furthermore, he should not be allowed to testify that the stairs in question were “safe.”  
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11 Respectfully submitted on September 4, 2007

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13 O’CONNOR BERMAN DOTTS & BANES  
14 Attorney for Plaintiffs Moses T. and Qianyan S. Fejeran  
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17 By: \_\_\_\_\_/s/\_\_\_\_\_  
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